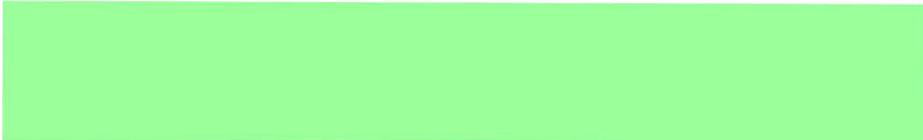
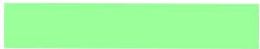


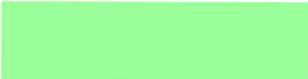
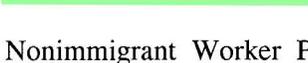


U.S. Citizenship
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Services

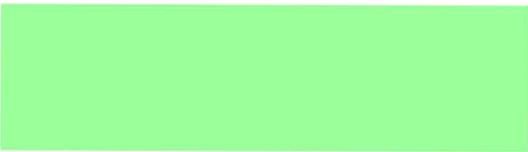
(b)(6)



DATE: NOV 05 2013 Office: CALIFORNIA SERVICE CENTER File: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will remain denied.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on May 4, 2012. On the Form I-129 petition, the petitioner describes itself as an IS/IT consultancy services business established in 1995. In order to employ the beneficiary in a position to which it assigned the job title of "systems analyst," the petitioner seeks to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

Upon reviewing the Form I-129 and the documentation submitted as support, the director issued a request for additional evidence (RFE) which requested that the petitioner submit evidence to demonstrate (1) that a valid employer-employee relationship will exist with the beneficiary, and (2) that there is sufficient specialty occupation work for the beneficiary to perform at the entity ultimately using the beneficiary's services for the duration of the H-1B requested validity period. The director provided a list of some of the types of specific evidence that could be submitted.

After reviewing the petitioner's response to the RFE, the director denied the petition, finding that the petitioner failed to demonstrate that there exists a reasonable and credible offer of employment. The petitioner, through counsel, submitted a timely appeal of the decision. On appeal, counsel for the petitioner contends that the director's basis for denial of the petition was erroneous. In support of this contention, counsel for the petitioner submits a brief and additional evidence.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the RFE; (3) the petitioner's response to the RFE; (4) the director's notice denying the petition; and (5) the petitioner's Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

The AAO will also address additional, independent grounds, not identified by the director's decision, that the AAO finds also preclude approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the evidence in the record of proceeding does not establish (1) that the petitioner will be a United States employer having an "employer-employee relationship" with the beneficiary as an H-1B temporary employee, (2) the petitioner's eligibility at the time of filing for the benefit sought, and (3) that the petition was filed for non-speculative work for the beneficiary that existed as of the time of the petition's filing for the entire period requested.

The petitioner indicated on the Form I-129 that it intends to employ the beneficiary as a systems analyst from October 1, 2012 to September 30, 2016,¹ on a full-time basis at a salary of \$56,600 per year. The Form I-129 indicates that the beneficiary will be employed off-site at [REDACTED] Wisconsin.

In the Labor Condition Application (LCA) submitted in support of the instant petition the petitioner indicated that the beneficiary will be employed at [REDACTED] Wisconsin. The LCA also indicates that the occupational category is designated as "Computer Systems Analyst," SOC code 15-1121 and that the period of intended employment is from October 1, 2012 to September 30, 2015. The petitioner will pay the beneficiary an annual salary of \$56,600 per year for work to be performed at [REDACTED] Wisconsin.

In a support letter dated May 3, 2012, signed by the petitioner's Assistant Vice President of Human Resources, the petitioner states that the beneficiary would work in the proffered position for the petitioner's client, [REDACTED] Wisconsin, on a project called [REDACTED] (herein after, the Project).

The support letter states that the beneficiary "is being hired for executing the role of Systems Analyst" and that "[s]he would be providing consulting services for the following activities listed below":

- Design [and] Development Includes creation of Business Process Diagrams, Developing Proof of Concept for functionalities spanning across Service Orders, Activities, [and] Field Service.
- Gather requirements for Invoicing and Preventive Maintenance Track, analyze user needs [and] processes. Coordinate between Testing and Offshore Development Teams.
- Perform Impact Analysis on Change Requests and Technical Design. Assess Performance needs of the applications and devise time and cost effective solutions[.]
- Provide timely and accurately [sic] resolution of issues impacting Production Sites of Clients and Customers.
- Create high-level and low-level design and architecture specifications.

The support letter further describes the beneficiary's duties, as follows:

[The beneficiary] will be required to test, maintain and monitor computer programs and systems, including coordinating the installation of computer programs and systems. She will develop, document and revise system design procedures, test procedures and quality standards. Therefore, it is imperative that [the] candidate for this position not only possess, but also be an expert to review and analyze computer performance indicator to locate code problem

¹ The requested H-1B validity period may not exceed three years. Thus the period would end on September 30, 2015.

and correct errors by correcting codes. This position also requires the ability to coordinate and link computer systems within an organization to increase compatibility so that information can be shared. [The beneficiary] is also required to read manuals, periodicals, and technical reports to learn how to develop programs that meet staff and user requirements. In addition, she will consult management to ensure agreement on systems principles. [The beneficiary] will confer with clients regarding the nature of the information processing or computation needs. She will use her practical knowledge of various software languages, tools and platforms and implement various client server applications such as Oracle, C, C++, Windows, UNIX, Siebel, SFDC amongst other techniques under a [sic] supervision of an experience[d] team lead.

The support letter also states that the proffered position “is a professional level position, and as such, we absolutely require, at a minimum, the functional equivalent of a four year Bachelor of Computer Science, Engineering, Management Information Systems, Computer Information Systems or related field. In addition, we require at least two years of experience in software development and consulting.”

With the initial filing, the petitioner also submitted the following documents:

- A copy of a 40-page document titled “Scope of Work for [REDACTED] (hereinafter, the SOW) with the date January 14, 2011 on the cover page. This document states the following:

This . . . SOW . . . dated as of February 1, 2011, is between [REDACTED] a division of the [REDACTED] and is made pursuant to and in accordance with that certain Information Technology Services Agreement between [REDACTED] (the “Company”) and [REDACTED] (“Contractor”),² dated August 5, 2009. . . .

On page 24 of the SOW, the milestones for the project indicate that the project will end in September 2012 with the conclusion of a post production support period. On Page 29 of the SOW, it states that “[t]he project timeline is 1st Feb untill [sic] 30 Sept 2012.” Page 37 of the SOW contains a document titled “15. ADDENDUM - Software License Usage Approval Agreement” between [REDACTED] extending a software license to the Contractor for the [REDACTED] project from February 1, 2011 to December 31, 2012.

- A copy of pages 1-6 and 47 of a document entitled “Information Technology Services Agreement” (hereinafter, the IT Services Agreement) made on August 5, 2009, between [REDACTED] The IT Services Agreement

² It is unclear what the exact relationship is between [REDACTED] and the petitioner.

³ It is unclear what the exact relationship is between [REDACTED] and the petitioner.

⁴ It is unclear what the exact relationship is between [REDACTED] and the petitioner.

states:

The Company [REDACTED] hereby appoints the Contractor [REDACTED] on a non-exclusive basis either by itself or through the [REDACTED] and its approved branch offices or affiliates to provide software development, implementation, maintenance, support and other information management or information technology services (together services) in accordance with the terms of this Agreement, and the Contractor [REDACTED] hereby accepts such appointment. The period of appointment is from January 1, 2010 through December 31, 2012.

The IT Services Agreement also includes a section (Section 3) dedicated to the contractor's [REDACTED] personnel. Specifically, this section includes the following statements that appear to have been highlighted by the petitioner:

- The Contractor is responsible for providing personnel to perform its obligations under this Agreement and all Task Orders.
- The Contractor will be entirely responsible for staff and worker selection and hiring to meet forecasts, including, without limitation, determining and hiring the appropriate mix of skill types and expertise levels.
- The Contractor shall be solely responsible for all matters in connection with its workers (including, without limitation, provision of salary, benefits, training, promotions and provision of visas, work permits, housing and related matters while on-site).
- The Contractor will be solely responsible for maintaining satisfactory standards of Worker competency, conduct and integrity and for taking such disciplinary action with respect to Workers as may be required under the circumstances.

The AAO notes that in subsection 3.2 of section 3, there is a blank space indicating that some text has been redacted or removed. Also, subsection 3.5 is completely blank, indicating that the text of this subsection was also redacted or removed.

On September 25, 2012, the director issued an RFE, requesting evidence (1) to establish that the petitioner would have an employer-employee relationship with the beneficiary through the right to control the manner and means by which the product or services are accomplished, for the requested H-1B validity period, and (2) that there is sufficient specialty occupation work for the beneficiary for the duration of the requested H-1B validity period. The director noted that the agreements submitted with the initial filing stated that the beneficiary's project would terminate in September 2012 and that the contractual relationship between the petitioner and the end-client was valid only through December 31, 2012. The director stated that as the petitioner was requesting H-1B classification for October 1, 2012 through September 30, 2016,⁵ the documents in the record did not cover the entire duration of the requested H-1B validity period.

⁵ As previously noted, the requested H-1B validity period may not exceed three years. Thus the period would end on September 30, 2015.

On November 27, 2012, in response to the director's RFE, the petitioner provided its RFE response letter and the following evidence:

- A copy of pages 1-6 and 47 of the IT Services Agreement made on August 5, 2009, that was submitted with the initial filing.
- A copy of a document entitled "Letter of Offer" dated April 4, 2011, from [REDACTED], addressed to the beneficiary.
- A copy of the petitioner's "Conditions of Employment Agreement," signed by the beneficiary but undated.
- A copy of a 21 page document from [REDACTED] entitled "Standard Operating Procedure & Policy Performance Management."
- An organization chart for the [REDACTED].

In its RFE response, in regard to the validity dates of the SOW and IT Service Agreement submitted with the initial filing, the petitioner stated:

Please note that the Information Technology Services Agreement (MSA) is currently in process of renewal between [REDACTED] and the end client [REDACTED] and it is pending final determination with [REDACTED]. Our company is currently in the process of working with the officers of [REDACTED] to extend this contract for another three (3) year period; which would then begin on January 1, 2014.⁸

On appeal, the petitioner submitted, among other things, (1) a brief, (2) a copy of a document entitled "GDC Master Services Agreement," made on December 3, 2012, between [REDACTED] and (3) a copy of Amendment # 5, Scope of Work for [REDACTED] dated October 29, 2012, by and between [REDACTED] acting through and on behalf of its [REDACTED] division and [REDACTED] (hereinafter, the amended SOW).

The [REDACTED] states that "[t]he period of appointment is from January 1, 2013 through December 31, 2015."

⁶ It is unclear what the exact relationship is between [REDACTED] and the petitioner.

⁷ It is unclear what the exact relationship is between [REDACTED] and the petitioner.

⁸ The RFE response from the petitioner contains information that is inconsistent with the rest of the record of proceeding. Regarding the dates of the agreement being negotiated, the petitioner states that the new agreement will begin on January 1, 2014. The agreement that was subsequently submitted on appeal states that it entered into force on January 1, 2013. Therefore, it is unclear if the petitioner is referring to a different agreement or if this date was stated in error. Regarding the beneficiary's work location, the petitioner stated that the beneficiary is intended to work in [REDACTED] Ohio and that an LCA had been filed for this location. The worksite location stated on the Form I-129 and LCA is located in [REDACTED] Wisconsin. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The amended SOW outlines an updated timeline for the project, indicating that “[t]he Project timeline is 1 Feb, 2011 to 31 Dec, 2013” and that [REDACTED] would provide support to the project through December 31, 2013.

In the appeal brief, dated February 4, 2013, the petitioner provided the following “itinerary for the project [the beneficiary] will be assigned to in the USA”:

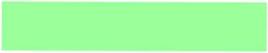
Itinerary of work

Mar 2013 – June 2013

- Work on the Design phase of a new project.
- Preparing System Design Documents.
- Conduct feasibility study for the new requirements.
- Assessing the business requirements and expectations towards the application and to incorporate the same into the application after business approvals.
- Obtain sign off for the technical design from the Enterprise Architecture team.

July 2013 – Oct 2013

- Work on the technical development as per the approved design document.
- Coordinate with offshore team for development process.
- Coordinate the efforts for documenting test plan and test cases for project.
- Developing test plan and test strategy.
- Lead and coordinate unit testing along with the development process.
- Coordinate execution of all test cases in Quality in QA environment.
- Coordinating and leading implementation of the fixes for the defects captured.
- Coordinating and executing second round of test case execution after defect fixing.
- Preparing for system readiness for integration testing with the external systems involved.
- Executing and coordinating system integration testing.
- Estimation for fixes and impact analysis for the defects captured in the system integration testing.
- Coordinating and leading implementation of the fixes for the defects captured.
- Coordinating and executing second round of system integration testing after defect fixing.
- Training business users for User Acceptance Testing.
- Application hand off to the business and coordinating User Acceptance Testing.
- Estimation for fixes and impact analysis for the defects and the enhancements captured in the User Acceptance Testing.



- Coordinating and leading implementation of the fixes for the defects/enhancements captured.
- Coordinating second round of User Acceptance Testing and obtaining sign off from the business users.

Nov 2012 – Dec 2013

- Coordinating Application deployment in Production environment for the Pilot release.
- Supporting and addressing issues during the Pilot release.
- Coordinating regular health checkups for the application throughout the pilot.

As a preliminary matter, and beyond the decision of the director, the AAO must determine whether the petitioner has established that it meets the regulatory definition of a "United States employer" as that term is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii); chiefly whether the record of proceeding establishes that the petitioner will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant in pertinent part as an alien:

subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . ., who meets the requirements for the occupation specified in section 214(i)(2) . . ., and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1)

The term "United States employer" is defined at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and*
- (3) Has an Internal Revenue Service Tax identification number.

(Emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is

noted that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file an LCA with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

Neither the former Immigration and Naturalization Service (INS) nor U.S. Citizenship and Immigration Services (USCIS) defined the terms "employee" or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

The United States Supreme Court has determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. at 440 (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. *See generally* 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.⁹

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification

⁹ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." *See, e.g., Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984).

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee," "employed," "employment" or "employer-employee relationship" indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* construction test, apply to the terms "employee," "employer-employee relationship," "employed," and "employment" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h). That being said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.,* section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.¹⁰

Therefore, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).¹¹

Thus, in considering whether or not one will be an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS must focus on the common-law touchstone of "control." *Clackamas*, 538 U.S. at 450; *see also* 8 C.F.R. § 214.2(h)(4)(ii) (defining a "United States employer" as one who "has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee . . ." (emphasis added)).

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *see also* *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 445; *see also* *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also* *Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

¹⁰ To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

¹¹ That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. See *Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

Furthermore, when examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. See *Darden*, 503 U.S. at 323-324. For example, while the assignment of additional projects is dependent on who has the *right* to assign them, it is the *actual* source of the instrumentalities and tools that must be examined, not who has the *right* to provide the tools required to complete an assigned project. See *id.* at 323.

Lastly, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, . . . the answer to whether [an individual] is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

In the instant case, the agreements and SOWs submitted into the record and discussed above, do not list the petitioner as one of the parties involved. Rather, the SOWs and agreements are between the client, [REDACTED] and its subsidiary [REDACTED] and entities other than the petitioner (namely, [REDACTED]). It is unclear from the record if or how the petitioner is related to [REDACTED]. Thus, based on the evidence in the record of proceeding, the petitioner does not appear to be a party to the submitted agreements. We note that even if the petitioner were the entity stated on the submitted documents, the petitioner failed to submit sufficient evidence such as contracts, work orders, and statements of work which outline in sufficient detail the nature and scope of the beneficiary's intended employment with the end-client, [REDACTED]. While the record contains the IT Service Agreement, the SOWs, and the [REDACTED] noted above, the record is devoid of any documentation indicating the availability of work, from the time the petition was filed, for the entire requested validity period at [REDACTED] location. Thus, there is insufficient documentary evidence in the record corroborating what the beneficiary would do, where the beneficiary would work, and the availability of work for the beneficiary for the entire requested period of employment. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Based on a review of the evidence, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The evidence of record, therefore, is insufficient to establish that the petitioner qualifies as a "United States employer," as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming that the beneficiary is the petitioner's employee and that the beneficiary will work on a project for the petitioner at [REDACTED] location does not establish that the petitioner exercises any substantial control over the beneficiary and the substantive work that she would perform. Without documentary evidence supporting the petitioner's claims, the petitioner has not established eligibility in this matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Moreover, the evidence submitted fails to establish definitive, non-speculative employment for the beneficiary for the entire period requested. Although the petitioner requested, on the Form I-129, that the beneficiary be granted H-1B classification from October 1, 2012 to September 30, 2015, there is insufficient documentation regarding work for the beneficiary for the duration of the requested period. As previously noted, the IT Service Agreement states that "[t]he period of appointment is from January 1, 2010 through December 31, 2012," and the SOW states that "[t]he Project timeline is 1st Feb until [sic] 30 Sept 2012."

The AAO finds that, while the IT Service Agreement may have been renewable at the time the petition was filed, it was not renewed prior to the date the petition was filed. In fact, as previously noted, on appeal the petitioner submitted the [REDACTED] made on December 3, 2012 (approximately seven months after the petition was filed) and an amended SOW. The petitioner also did not submit documentary evidence regarding any additional work for the beneficiary. Thus, the petitioner has failed to establish that the petition was filed for non-speculative work for the beneficiary that existed *as of the time of the petition's filing*, for the entire period requested. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Thus, even if it were found that the petitioner would be the beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the petitioner has not demonstrated that it would maintain such an employer-employee relationship with the beneficiary for the duration of the period requested.¹²

¹² The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

Moreover, we note that even if the [REDACTED] had existed at the time of filing, the terms of the agreement do not establish that the petitioner would be the beneficiary's employer for the duration of the H-1B validity period. Specifically, the SOW amendment states that the project runs through December 31, 2013 as confirmed by the petitioner's letter. The record is silent as to what the beneficiary would do after this date or what type of relationship she would have with the petitioner or a future client. Thus, the record does not demonstrate that the petitioner established, at the time of filing, that it would maintain an employer-employee relationship with the beneficiary for the duration of the requested H-1B validity period.

Based on the above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). Furthermore, the petition must also be denied due to the petitioner's failure to establish eligibility at the time of filing and to proffer non-speculative employment to the beneficiary. Accordingly, for all of these reasons, the petition must be denied.

The AAO will now address the director's basis for denying the petition, namely that the petitioner has not established that there exists a credible offer of employment in a specialty occupation. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that there exists a credible offer of employment in a specialty occupation.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). USCIS regulations affirmatively require a petitioner to

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1).

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is

preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The petitioner stated on the Form I-129 that the beneficiary would be employed in a systems analyst position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the evidence in the record of proceeding establishes that performance of the particular proffered position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty as the minimum for entry into the occupation, as required by the Act.

When determining whether a position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R.

§ 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

One consideration that is preliminary to the issue of whether a proffered position qualifies as a specialty occupation, is whether the petitioner has provided substantive information and supportive documentation to establish that the beneficiary would be performing services for the type of position for which the petition was filed (here, a systems analyst). Another such consideration is whether the petitioner has established that, at the time of the petition's filing, it had secured definite, non-speculative work for the beneficiary that accords with the petitioner's claims about the nature of the work that the beneficiary would perform in the proffered position.

The AAO finds that the petitioner has failed in each of these regards. Accordingly, the AAO affirms the director's conclusion that the petitioner failed to establish that it made a credible offer of employment in a specialty occupation.

As discussed above, the evidence in the record of proceeding fails to establish that, at the time the petition was filed, the petitioner had secured definite employment as a systems analyst for the beneficiary for the requested period of H-1B employment.

Here, the AAO finds that the record lacks evidence (1) corroborating that the petitioner has work that exists as an ongoing endeavor generating definite, non-speculative employment for the beneficiary's services for the period of employment specified in the Form I-129; (2) establishing the nature and duties of the work that the beneficiary would perform; and (3) establishing that the beneficiary's duties, as described, would actually require the theoretical and practical application of at least a baccalaureate level of a body of highly specialized knowledge in a specific specialty, or its equivalent, as required by the Act.

For the reasons related in the preceding discussion, the AAO finds that the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. Accordingly, for this additional reason, the petition cannot be approved.

With regard to the beneficiary's qualifications, the petitioner did not submit sufficient evidence regarding the proffered position to determine whether it requires a baccalaureate or higher degree in a specific specialty or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the beneficiary possesses that degree or its equivalent. Therefore, the AAO will not address the beneficiary's qualifications further, except to note that, the petitioner did not submit an evaluation of the beneficiary's foreign degree or sufficient evidence to establish that the beneficiary's degree is the equivalent of a U.S. bachelor's degree in a specific specialty. As such, since evidence was not presented that the beneficiary has at least a U.S. bachelor's degree in a specific specialty or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D.



Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.